

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

JOINT STATUS REPORT

Jury Trial X Yes No

I. Summary of Claims:

This is an environmental case claiming that the poultry waste handling, storage, treatment, transportation, and disposal practices for which the Poultry Integrator Defendants are alleged to be legally responsible have caused, and continue to cause, an endangerment of human health and injury to the Illinois River Watershed in eastern Oklahoma, including the surface and ground waters, soils, sediments, lands, and biota therein. The State has asserted claims sounding in federal statutory law (CERCLA cost recovery, CERCLA natural resource damages and RCRA), federal common law (federal common law of nuisance); state common law (nuisance, trespass and unjust enrichment) and state statutory law (the Oklahoma Environmental Quality Code, the Oklahoma Agricultural Code, the Oklahoma Registered Poultry Feeding Operations Act, and the Oklahoma Concentrated Animal Feeding Operations Act). Relief sought by the State includes cost recovery, assessment costs, natural resource damages, injunctive relief, penalties, expenses, declaratory rulings, attorneys' fees, restitution, disgorgement, prejudgment interest, and actual, punitive, and exemplary damages.

A. Claims to be Dismissed

None.

II. Summary of Defenses:

Defendants deny all allegations by the State to the extent that they have sufficient knowledge to admit or deny the allegations in the State's First Amended Complaint. The use of poultry litter as a valuable natural fertilizer and soil amendment is a longstanding practice in the Illinois River Watershed ("IRW") and many other agricultural communities that creates fertile soil by replenishing vital nutrients, reducing acid levels, and creating or enhancing the soil's profile and structure. Defendants will contend, *inter alia*, that they are not liable for the actions of the independent contract growers or third parties who use poultry litter as an integral part of their agricultural operations; that poultry litter is not a "solid waste" or "hazardous waste;" that application of poultry litter for agricultural purposes is not a release of a "hazardous substance;" that Oklahoma's statutes regarding application of poultry litter have not been violated; that no

nuisance or trespass has occurred as the result of the land application of poultry litter; and that “damage” to the IRW, if any, is attributable to other sources, both natural and anthropogenic.

In addition, Defendants will contend that Arkansas and Oklahoma are parties to the Congressionally-approved Arkansas River Basin Compact that was created in 1970 to resolve interstate water quality issues in the Illinois River and other interstate waters. The State, however, chooses to ignore the dispute resolution provisions of the Arkansas River Basin Compact by bringing this suit. Likewise, the State ignores the laws and regulations of both States which expressly allow the practices complained of in this suit. While the State’s disregard for the Oklahoma Legislature and the primary jurisdiction of Oklahoma agencies is a State political issue as well as a substantive legal issue in this action, the State’s encroachment on the sovereignty of Arkansas and attempted imposition of penalties, regulation, and political will upon Arkansas citizens is a clear violation of the Commerce Clause, the Defendants’/ Third-Party Plaintiffs’ Due Process rights, and the federalist structure of the United States Constitution. In addition to severe constitutional defects, the State’s suit is preempted by the Clean Water Act and Arkansas River Basin Compact, seeks to re-define federal pollution control laws, attempts to revive the now-defunct federal common law action for interstate water pollution, and wedges the State’s own policy choices into the midst of ongoing Congressional and State legislative debate on the subject of this suit.

Defendants/Third-Party Plaintiffs have asserted approximately 73 affirmative and other statements of defense in their respective Answers, which are incorporated by reference.

Since the State has chosen to pursue Defendants/ Third-Party Plaintiffs for such a common practice as using poultry litter as a natural fertilizer and soil amendment and for the alleged pollution of the IRW by naturally-occurring nutrients, Defendants/ Third-Party Plaintiffs are forced to implead more than 160 Third-Party Defendants who are representative of the myriad sources of contamination to the IRW. If this Court finds that Defendants/ Third-Party Plaintiffs are liable for any damage to the IRW, then these Third-Party Defendants must indemnify the Defendants/ Third-Party Plaintiffs or otherwise be held liable for their own contribution to the application of common nutrients to the million-plus acres of the IRW.

The State objects to the Defendants’ Summary of Defenses as improper due to its argumentative nature and factual inaccuracies.

A. Defenses to be Dismissed

None

III. Motions Pending

Defendants have individually filed joinders in the following Motions filed by one or more of them:

- No. 53 *Cargill, Inc. and Cargill Turkey Production, LLC’s Objection to Plaintiffs’ Designation of Complaint as “Related Case” filed on October 3, 2005*
- No. 64 *Tyson Poultry, Inc.’s Motion to Dismiss Count 3 of Plaintiffs’ First Amended Complaint filed on October 3, 2005*
- No. 65 *Tyson Chicken, Inc.’s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under the Political Question Doctrine filed on October 3, 2005*
- No. 66 *Tyson Foods, Inc.’s Motion to Dismiss Counts 4-10 of the First Amended Complaint filed on October 3, 2005*

- No. 67 *Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint filed on October 3, 2005*
- No. 71 *Tyson Defendants' Motion for More Definite Statement with Respect to Counts One and Two of the Amended Complaint filed on October 3, 2005*
- No. 75 *Peterson Farms Inc.'s Motion to Dismiss filed on October 3, 2005*
- No. 90 *Cobb-Vantress Inc.'s Motion to Stay the Action filed on October 3, 2005*
- No. 91 *Peterson Farms Inc.'s Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action filed on October 3, 2005*

The State's Motions:

- No. 161 *Motion for Leave to File Supplemental Brief in Opposition re No. 64 filed on December 16, 2005*
- No. 162 *Motion for Leave to File Supplemental Brief in Opposition re No. 75 and 90 filed on December 16, 2005*
- No. 163 *Motion for Leave to File Supplemental Brief in Opposition re No. 67 filed on December 16, 2005*
- No. 164 *Motion for Leave to File Supplemental Brief in Opposition re No. 66 filed on December 16, 2005*
- No. 247 *Motion to Sever Stay Strike Dismiss Third-Party Complaint Claims [part of multi-part motion, see Doc #[252] for additional parts filed on April 3, 2006*
- No. 248 *Motion to Stay Time for Third-Party Defendants to Answer filed on April 3, 2006*
- No. 252 *Motion to Dismiss claims in Third-Party Complaint, Motion to Stay (submitted as part of Doc # 247) filed on April 3, 2006*
- No. 253 *Supplement (Re: Motion to Sever, Stay, Strike, Dismiss Third-Party Complaint Claims, [252] Motion to Dismiss claims in Third-Party Complaint, Motion to Stay (submitted as part of Doc #247) filed on April 5, 2006*

IV. Stipulations

A. Jurisdiction Admitted: Yes X No (If no, explain)

Defendants dispute subject matter jurisdiction as set forth in their Motions to Dismiss based upon the State's alleged failure to exhaust administrative remedies, and pursuant to the doctrines of exclusive and/or primary jurisdiction. The State has opposed these motions to dismiss.

B. Venue Appropriate: Yes X No (If no, explain)

Defendants reserve their right to move for a change of venue for purposes of trial at the appropriate juncture. The State contends that venue is appropriate.

C. Facts: None

D. Law: None

V. Proposed Deadlines:

The parties agree that it will be necessary for the Court to conduct a Scheduling Conference for the purpose of establishing deadlines and entering a Case Management Order for the orderly management of this complex case. The parties also agree that in anticipation of the Scheduling Conference that they will work to develop an agreed Case Management Order. If an agreement

cannot be reached, the parties request the opportunity to present the Court with their respective proposals for case management.

The State submits the following proposed deadlines. Defendants do not agree with the following proposed dates or the case management structure they imply (including the the State's failure to phase the disclosures of experts), and they assert that it will be premature to establish deadlines or to enter a Case Management Order until the Third-Party Defendants have answered or otherwise pled in response to the Third Party Complaint. The State disagrees that setting the following deadlines would be premature:

- A. **Parties to be added by:** October 2, 2006
- B. **Proposed discovery cutoff date:** July 31, 2007 (fact)
October 15, 2007 (expert)
- C. **Fact witness lists to be exchanged by:** January 15, 2007
- D. **Proposed date for expert reports by plaintiff and defendant:** August 15, 2007

VI. Fed. R. Civ. P. 26(1) Discovery Plan

- A. **Should any changes be made to the timing, form or requirements for disclosures under Rule 26(a):** X Yes No

If yes, please explain: This is a complex case, with a large amount of discovery materials from multiple State agencies subject to disclosure. Defendants/Third-Party Plaintiffs request that once all of the Third-Party Defendants have answered or otherwise pled in response to the Third Party Complaint, that a supplemental Joint Status Report and discovery Plan be submitted to address the disclosures of these parties/claims, including any requested modification to the 30-day disclosure deadline for newly added parties. Fed. R. Civ. 26(a)(1).

Attorneys for some Third-Party Defendants attended the conference between the State and Defendants on March 30 to work on this Joint Status Report. Others were notified by mail later of the ongoing process of completing the Joint Status Report. Still others have just recently answered or entered appearances for recently served Third-Party Defendants. Because of the circumstances surrounding their recent entry into the case, it has not been possible to meaningfully involve them in the preparation of the Joint Status Report.

- B. **When were or will initial disclosures under Rule 26(a)(1) be made?**

Defendants have requested sampling data collected from the Illinois River Watershed by consultants employed by the State in connection with the *State of Oklahoma v. Tyson Foods, Inc.* action. Although the State maintains that this data is work product protected from disclosure under Rule 26, it has agreed without waiving this claim to provide Defendants with a description of categories of data--not the information itself--that its consultants have collected on April 13, 2006.

The parties who are signatories to this report have agreed to exchange Initial Disclosures on April 28, 2006.

The parties who are signatories to this report have agreed to either produce or make available for inspection the documents identified in their respective Initial Disclosures on May 26, 2006.

Note that pursuant to Rule 26(a)(1), initial disclosures must be made within 14 days after you confer for the purpose of preparing this discovery plan. All parties are under an affirmative duty to (i) comply with the mandatory disclosure requirements, and (ii) notify the Court of any nondisclosure so that the issue can be promptly referred to a Magistrate Judge for resolution. Failure of any party to disclose information, or failure of any party to bring disclosure issues to the Court's attention in a timely manner, may result in sanctions, including prohibiting the use of that information at trial, pursuant to Rule 37(c)(1).

C. Should discovery be conducted in phases and / or should discovery be limited at this time to the Federal Rules of Civil Procedure or the Court's local rules?
 ____ Yes X No (As to parties participating in this Rule 26(f) conference.)

Defendants reserve their right to request modification of any Case Management Order in the event the State files a motion for a preliminary injunction or otherwise seeks to proceed in a manner that may require phasing or modification to discovery procedures.

Defendants contend that judicial economy requires that discovery involving Third-Party Defendants should proceed simultaneously with discovery between the Defendants and the State. The State believes that subject to the State's motion to sever and stay and/or strike or dismiss the third-party complaints, discovery of and by the Third-Party Defendants should be stayed.

D. Should any changes be made in the limitations on discovery imposed by the Federal Rules of Civil Procedure as to particular subject matters or issues?
 X Yes ____ No
 If yes, please explain:

The State's proposal:

1. As between the State and the first party defendants, the State shall serve no more than 25 interrogatories on any first party defendant, and the first party defendants collectively shall serve no more than 25 interrogatories on the State.
2. Contention interrogatories shall not be permitted.

Defendants object to the State's proposal as being premature and unsupported by the Federal Rules of Civil Procedure. Defendants will serve interrogatories in accordance with the Federal Rules of Civil Procedure, and in the event additional interrogatories are desired or necessary, Defendants will make application to the Court. Defendants further assert that discovery limitations should be addressed with the participation of the Third-Party Defendants, and request that the Court address the issue of discovery limitations and procedures in the course of establishing a Case Management Order.

E. Proposed Number of fact and expert depositions:

The State's proposal:

1. **To be allowed for Plaintiff?** The State shall be allowed no more than 100 fact depositions in the aggregate of first party defendants; there shall be no limit on non-party fact depositions by the State; the State shall be allowed one deposition of each expert named by first party defendants.
2. **To be allowed for Defendant?** First party defendants collectively shall be allowed no more than 100 fact depositions of the State; there shall be no limit on non-party fact depositions by first party defendants; first party defendants collectively shall be allowed one deposition of each expert named by the State.

Defendants do not object to the general limitations set forth by the State, but they reserve their right to propose a more comprehensive discovery plan once the Third-Party Defendants have appeared and can participate in the development of a Case Management Order.

F. Is there a need for any other special discovery management orders by the Court?

 X Yes No If yes, please explain.

Defendants anticipate that appropriate Protective Orders will be needed to address the disclosure of Defendants' proprietary, confidential business, and trade secret information, and that such Orders will need to protect such disclosed information from further disclosure through the court record or the Oklahoma Open Records Act. The parties are currently working to develop an Agreed Protective Order to accomplish these purposes.

Defendants also anticipate that the Court will need to closely control the environmental sampling and entry upon the property of non-parties to protect the property and rights of such persons.

The State objects to the argumentative nature of Defendants' statements. The State agrees that a Confidentiality Order may be appropriate in this case and has previously submitted a proposed Confidentiality Order for Defendants' review and approval. Defendants are in the process of reviewing and commenting upon the State's proposed Confidentiality Order.

The parties agree that a comprehensive Case Management Order will assist in the orderly management of this complex case.

VII. Are Dispositive Motions Anticipated? X Yes No

If yes, describe them. The State contemplates multiple motions for summary judgment and partial summary judgment being filed, and request that there be no restriction on the number of motions for partial summary judgment a party may file. Defendants anticipate filing both individual and joint motions for summary judgment and partial summary judgment.

VIII. Do All Parties Consent to Trial before the Assigned Magistrate Judge?

 Yes X No

IX. Is there any matter that should be referred to the assigned Magistrate Judge for final disposition upon partial consent of all the parties pursuant to Local Rule 73.1?

 Yes X No

X. Settlement Plan (Check one)

X **Settlement Conference Requested after:** Upon application.

Describe settlement judge expertise required, if any: Expertise in environmental matters and complex, multi-party litigation will be necessary. The parties have employed the services of two individuals in the past as settlement facilitators, and anticipate that at the appropriate juncture, they will either ask that these individuals be appointed as settlement judges in this case, or they may request the appointment of others to serve in this role.

 Private Mediation Scheduled in (date): Private settlement discussions will proceed as appropriate.

 Other ADR (Explain)

 ADR is not appropriate in this case (Explain)

Has a copy of the Court's ADR booklet been provided to clients as required?

Plaintiff	<u> X </u> Yes	<u> </u> No
Defendants	<u> X </u> Yes	<u> </u> No
Third Party Defendants	<u> </u> Yes	<u> </u> No

XII. Does this case warrant special case management? X Yes No

If yes, explain why. This is a complex case with multiple parties. In addition to the special case management provisions noted above and those provisions to be detailed in the Case Management Order, the parties request that all discovery matters be automatically referred to the Magistrate Judge unless otherwise requested by one of the parties.

Defendants request that the Court hear their Motions to Dismiss and alternative Motions to Stay Proceedings as early as the Court's schedule will permit. Further, given the complexity of the issues, the geographic scope of the IRW, and the number of parties, including Third-Parties, the Defendants request that once the Third-Party Defendants have answered the Court hold a scheduling conference and enter a Case Management Order addressing the needs of the parties and to provide for orderly administration of the case. Instead, the State requests a scheduling conference at the Court's earliest convenience.¹

XIII. Do the parties request that the Court hold a scheduling conference?
 X Yes No

If a conference is not requested, or ordered by the Court, the Court will, after receiving this report, issue a scheduling order based on the information contained in this report.

¹ Defendants Simmons Foods, Inc. and Willow Brook Foods, Inc. could not be reached and consulted regarding the inclusion of this sentence regarding the State's position in this Joint Status Report. As such, these Defendants have not approved or consented to this sentence.

Read and Approved by: (Add additional lines or pages as needed)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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